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IN THE
COURT OF APPEALS OF INDIANA

KEITH FLANNERY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0712-CR-672
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 9
The Honorable Heather A. Welch, Judge
Cause No. 49F09-0708-FD-153446

June 3, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Keith Flannery (Flannery), appeals his conviction for sexual battery, as a Class D felony, Ind. Code § 35-42-4-8.

We affirm.

ISSUE

Flannery raises one issue for our review, which we restate as: Whether there was sufficient evidence to support Flannery's conviction for sexual battery beyond a reasonable doubt.

FACTS AND PROCEDURAL HISTORY

On July 31, 2007, H.S. was walking around the streets of Indianapolis, somewhere near New York Street and Michigan Street. She was sixteen, had left her mother's home, and had been gone for a day. Flannery approached her and offered her a place to stay. H.S. accepted because she was afraid of what might happen to her if she stayed out on the streets. Another man was with H.S. at the time. Flannery took her to an apartment, located at 218 North Hendricks. Flannery kicked the other man out. He offered H.S. some food, but she didn't really eat. There was no furniture in the apartment, so H.S. laid down on the floor to go to sleep. Flannery laid down near her and scooted towards her. He reached his hand up her shirt and under her bra to feel her breast. H.S. told him to stop, but he did not; she had to push him off of her. H.S. got up to leave, and Flannery blocked the doorway. H.S. screamed, pushed Flannery in the chest, and ran out of the doorway. Jana Lumpkins (Lumpkins), who lived downstairs, encountered H.S. when she knocked on the backdoor and

said, "tell [Flannery] I can't stay where I'm scared." (Transcript p. 24). Lumpkins told her to come around to the front and called the police. When she told H.S. that she had called the police and H.S. said, "no, no, no," and ran down the alley. Lumpkins could tell that H.S. was scared. Indianapolis Metropolitan Police officers showed up, found H.S. nearby, and took a statement from H.S. about what had occurred. They placed Flannery under arrest.

On August 1, 2007, the State filed an Information charging Flannery with sexual battery, as a Class D felony, I.C. § 35-42-4-8. On October 13, 2007, the trial court held a bench trial. At the close of the evidence, the trial court found Flannery guilty as charged, and sentenced him to 910 days (two and one-half years) executed in the Department of Correction.

Flannery now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Flannery argues that the evidence presented by the State was insufficient to sustain his conviction for sexual battery, as a Class D felony. Specifically, Flannery contends that the State failed to present sufficient evidence that Flannery compelled H.S. to submit to the touching of her breast by using force or the imminent threat of force.

First, our general standard of review in regards to claims of insufficient evidence is well settled:

> In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. A conviction may be based upon circumstantial evidence alone. Reversal is

> appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense.

Perez v. State, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied* (citations omitted).

Indiana Code section 35-42-4-8 provides in pertinent part:

> A person who, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person, touches another person when that person is:
>
> (1) compelled to submit to the touching by force or the imminent threat of force
>
> * * * *
>
> commits sexual battery, a Class D felony.

Our supreme court has explained that "not all touchings intended to arouse or satisfy sexual desires constitutes sexual battery; only those in which the person touched is compelled to submit by force or the imminent threat of force violated Ind. Code § 35-42-4-8." *Scott-Gordon v. State*, 579 N.E.2d 602, 604 (Ind. 1991). Such force need not be physical or violent, but may be implied from the circumstances. *Id*.

> [I]t is the victim's perspective, not the assailant's, from which the presence or absence of forceful compulsion is to be determined. This is a subjective test that looks to the victim's perception of the circumstances surrounding the incident in question. The issue is thus whether the victim perceived the aggressor's force or imminent threat of force as compelling her compliance.

Tobias v. State, 666 N.E.2d 68, 72 (Ind. 1996).

In reviewing the record, we note that H.S., who was seventeen at the time of Flannery's trial, was acknowledged to be nervous while testifying and did not give the most

eloquent account of the events. That being said, she provided the following account, which supports the trial court's judgment:

[Defense counsel]	So you laid down on the floor?
[H.S.]	Yeah.
[Defense counsel]	What did you intend to do?
[H.S.]	Just lay there, [and] go to sleep.
[Defense counsel]	Well, what happened next.
[H.S.]	He—he laid down and scooted closer to me and I felt his hand touching my breast. And then his hand went under my shirt . . .
[Defense counsel]	Was he pretty close?
[H.S.]	Yes.
[Defense counsel]	Did you say anything to Mr. Flannery?
[H.S.]	I told him to stop . . . and got up . . . and left.
[Defense counsel]	Did Mr. Flannery stop?
[H.S.]	(No audible response)
[Defense counsel]	Yes or no . . .
[H.S.]	No, he didn't—but I had to push him off me . . . but . . .
[Defense counsel]	How many times did Mr. Flannery touch you?
[H.S.]	Just three times.

(Tr. p. 11). Then on redirect, H.S. testified that she did not feel like she could leave the room and was scared.

We conclude that H.S.'s account of the events supports an inference that Flannery persisted in touching her breast after she instructed him to stop. While there was no evidence that Flannery was violent in his actions of touching her breast, such evidence was not required. *See Scott-Gordon*, 579 N.E.2d 604. H.S.'s testimony supports an inference that Flannery's actions put her in fear when touching her breast, if not initially, when he persisted after her request that he stop. Moreover, H.S.'s testimony supports an inference that Flannery applied force when persisting to touch her breast after she told him to stop, which in turn required her to push him off of her. Therefore, we conclude that the State presented sufficient evidence to prove beyond a reasonable doubt that Flannery committed sexual battery, as a Class D felony.

CONCLUSION

Based on the foregoing, we conclude that the State presented sufficient evidence to prove, beyond a reasonable doubt, that Flannery committed sexual battery, as a Class D felony.

Affirmed.

ROBB, J., concurs.

BAKER, C.J., dissents with separate opinion.

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STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

Baker, Chief Judge, dissenting.

I respectfully dissent. Although H.S. did not consent to the touching, it is well established that "[e]vidence that a victim did not voluntarily consent to a touching does not, in itself, support the conclusion that the defendant compelled the victim to submit to the touching by force or threat of force." Chatham v. State, 845 N.E.2d 203, 207 (Ind. Ct. App. 2006).

In Chatham, the victim was walking outside when the defendant came up behind her and put his hand between her thighs. The victim turned around, saw the defendant, became scared, and walked away. Chatham was charged with and convicted of class D felony sexual battery. This court reversed Chatham's conviction, finding insufficient evidence of force or threat of force:

> We are constrained to disagree with the state. The fear experienced by the victim must precede the touching for the fear to indicate that the victim was compelled to submit to the touching by force or the imminent threat of force. Here, [the victim] did not experience fear of

> Chatham until he had grabbed her. [The victim's] fear following the incident does not indicate that she was compelled to submit to the touching by force or imminent threat of force.
>
> We agree that [the victim] did not have the opportunity to grant or deny consent to the touching, but we cannot distinguish this situation from that in [Scott-Gordon v. State, 579 N.E.2d 602 (Ind. 1991),] where the defendant also approached the victim from behind and grabbed him and the Indiana Supreme Court found no evidence that the victim was compelled to submit to the touching by force or the imminent threat of force. We are constrained to follow the Indiana Supreme Court's opinion in Scott-Gordon and hold that the evidence is insufficient to show that Chatham compelled [the victim] to submit to the touching by force or the imminent threat of force.

Id. at 207-08 (citation omitted) (emphasis added).

Here, as in Chatham and Scott-Gordon, there is no evidence that H.S. experienced any fear of Flannery before he fondled her breast. The fear that she experienced after the incident occurred does not establish that she was compelled to submit to the touching by force or imminent threat of force. Under these circumstances, I believe that there is insufficient evidence supporting Flannery's conviction and would reverse the judgment of the trial court and remand with instructions to enter judgment for battery as a class B misdemeanor. See id. at 208 (finding that evidence was sufficient to find that touching constituted class B misdemeanor battery pursuant to Indiana Code section 35-42-2-1(a)).